IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

		No. 26949-3-III
In re the Termination of:	)	
	)	**Division Three**
J.H.	)	
	)	**UNPUBLISHED OPINION**

Brown, J. ─ Sharlie Renee Hoit appeals the trial court's parental termination order concerning her daughter, J.H. Ms. Hoit contends the Department of Social & Health Services (the Department) failed to offer or provide necessary services required by RCW 13.34.180(1)(d). Because the record shows Ms. Hoit was offered and failed to complete threshold services and offering further services would have been futile under *In re Dependency of T.R.*, 108 Wn. App. 149, 29 P.3d 1275 (2001), we affirm.

FACTS

Ms. Hoit is the mother of J.H., born on July 3, 2003. In August 2006, the Department filed a dependency petition regarding J.H., after she and Ms. Hoit were found at a transient camp in Pend Oreille County, considered by the Department to be

an unsafe environment. The Department was concerned with Ms. Hoit's drug and alcohol use and placing J.H. in unsafe environments. J.H. was placed in foster care.

On February 15, 2007, following a hearing, J.H. was found to be a dependent child. The trial court's disposition order required the Department to provide and for Ms. Hoit to participate in the following services:

> [1] A drug and alcohol assessment, [2] random UA/BA [urinalysis/breath analysis] testing, [3] a psychiatric evaluation, [4] a parenting-attachment assessment, and [5] attend a dual diagnostic treatment center.

2 Report of Proceedings (RP) (Jan. 3, 2008) at 217.

The dependency findings of fact show J.H. was in a horrific situation in Ms. Hoit's care.[1] J.H. was emotionally neglected while her mother continued in a pattern of drug abuse and failed treatments. This created significant instability for J.H., as well as being harmful to her health and development. The Department attempted to get Ms. Hoit involved in services prior to filing for dependency, twice offering her treatment for substance abuse and making a referral for her to complete a bonding and attachment assessment. Ms. Hoit did not follow through with any of these services.

When Halei Young, the social worker assigned to the case, confronted Ms. Hoit regarding what she had to do to remedy her parenting deficits, she typically became verbally abusive and uncooperative. Ms. Hoit began and ended treatment twice in the year since the dependency began, and she was incarcerated for much of the spring

[1] The facts in this paragraph are unchallenged, and therefore, are verities on appeal. *In re Interest of Mahaney*, 146 Wn.2d 878, 895, 51 P.3d 776 (2002).

and summer of 2007.

In May 2007, the Department petitioned for termination of Ms. Hoit's parental rights to J.H. On December 19, 2007, and January 3, 2008, a hearing was held on the petition. The State called six witnesses; Ms. Hoit called no witnesses. Ms. Hoit was present for the first day of the hearing, but absent on the second day.

On the first hearing day, Scott Anderson, Ms. Hoit's community corrections officer, testified Ms. Hoit had begun treatment at Spokane Addictions Recovery Center (SPARC) on December 13, 2007 as a condition in a district court case.

Vicki Sneed, a clinical supervisor and chemical dependency professional at Isabella House, a long-term residential treatment facility in Spokane, testified Ms. Hoit twice entered their program, first on October 10, 2006 for one day. Ms. Hoit entered the program for the second time on October 4, 2007, but she stayed less than 24 hours. Ms. Sneed testified Ms. Hoit did not participate in any substance abuse treatment during her time at Isabella House.

Tennille Lightfoot, a clinical supervisor at American Behavioral Health Systems (ABHS), an intensive inpatient chemical dependency treatment center, testified Ms. Hoit twice entered their program, October 21, 2006 to October 25, 2006, and October 16, 2007 to October 21, 2007. Ms. Hoit did not complete the program on either occasion, leaving the program each time without clinical advice. Ms. Lightfoot testified Ms. Hoit referred herself for her first stay in the program, and for her second stay, she

was referred by the Alcohol and Drug Network.

Ms. Young testified she offered services to Ms. Hoit between dependency filing and the dependency order entry ─ August 2006 and February 15, 2007. Ms. Young referred Ms. Hoit for drug and alcohol treatment to New Horizons on September 19, 2006, but Ms. Hoit did not participate. Ms. Young referred Ms. Hoit for a child bonding and attachment assessment on September 20, 2006 that she cancelled on October 16, 2006, based on her belief that Ms. Hoit was still using drugs. Ms. Young testified she made two referrals for drug testing to American Drug Testing on September 1, 2006 and October 9, 2006. Ms. Hoit completed two UAs before calling Ms. Young, saying "she couldn't do them anymore . . . . [s]he said it was just too much." 2 RP (Jan. 3, 2008) at 203. Ms. Hoit twice visited J.H. in October 2006 before the court suspended visitation on December 14, 2006 due to her disruptive behavior.

Ms. Young testified she had one contact with Ms. Hoit between entry of the dependency order and the termination hearing, when Ms. Hoit called her on March 2, 2007. Ms. Hoit informed Ms. Young she was recently released from jail, that she was self-medicating, and that she wanted to go to Anna Ogden Hall, a facility Ms. Young believed offered transitional living and treatment services. Ms. Young testified Ms. Hoit's behavior was escalating on the phone, so she informed Ms. Hoit she should contact her lawyer and terminated the phone call.

About once a month, Ms. Young would "look on the jail web site, to see if [Ms.

Hoit] was incarcerated" in the Spokane County Jail. 2 RP (Jan. 3, 2008) at 221. Ms. Young testified Ms. Hoit was in jail most of the time between the entry of the dependency order and the termination hearing. Ms. Young testified, "I didn't feel there was anything I could do for her at the jail." 2 RP (Jan. 3, 2008) at 222.

After the entry of the dependency disposition order, Ms. Young offered no additional services to Ms. Hoit because Ms. Hoit continued to get arrested, continued to use drugs and alcohol, continued to use poor judgment, and the "ability for her to make rational decisions wasn't there . . . to make these referrals and for her to follow through with these assessments she needs to be able to - - listen to . . . guidance, follow direction." 2 RP (Jan. 3, 2008) at 224. Ms. Young conceded, "a psychiatric evaluation - - dual diagnostic treatment, individual mental health counseling, parenting classes, psychological evaluation or [a] drug/alcohol assessment" were services she felt were reasonably available, and could potentially correct Ms. Hoit's parental deficiencies. 2 RP (Jan. 3, 2008) at 299. But Ms. Young explained Ms. Hoit had not made any progress in addressing her issues, and that there was little likelihood of change in the near future.

Asked if "it would do any good to give Ms. Hoit more time to participate in services," Moira Hemphill, the Guardian Ad Litem, testified, "I don't think so." 2 RP (Jan. 3, 2008) at 161. Ms. Hemphill further testified, "I can't see any likelihood of significant change at any time in the - - foreseeable future." 2 RP (Jan. 3, 2008) at 161.

The trial court concluded the statutory elements of RCW 13.34.180(1)(a) (b), (c), (d), (e) and (f) had been met and granted termination of the parent-child relationship under RCW 13.34.180 and .190. Regarding RCW 13.34.180(1)(d), the trial court found "[s]ervices court-ordered under RCW 13.34.130[2] have been expressly and understandably offered or provided and all necessary services, reasonably available, capable of correcting parental deficiencies within the foreseeable future have been offered or provided." Clerk's Papers (CP) at 14. Further, the trial court found "any attempts to engage Ms. Hoit in services before she had treated her substance abuse issues would have been premature." CP at 14.

The trial court remarked, "I think the court would have preferred that . . . Ms. Young, had actually made an effort to meet with Ms. Hoit when she was in jail." 2 RP (Jan. 3, 2008) at 330. However, under *T.R.*, 108 Wn. App. 149, the court concluded offering services to Ms. Hoit would have been futile without her following through with substance abuse treatment. Ms. Hoit appealed.

ANALYSIS

The issue is whether the trial court erred in finding the element set forth in RCW 13.34.180(1)(d) was met before entering its termination order. Ms. Hoit contends the Department failed to meet its burden of clear and convincing evidence on the elements

[2] This reference to RCW 13.34.130 appears to be in error. Effective June 8, 2000, the portions of RCW 13.34.130 addressing services were deleted, and recodified as RCW 13.34.136. *See* Laws of 2000, ch. 122, §§ 15, 18. Accordingly, this court assumes the trial court meant to refer to services court-ordered under RCW 13.34.136.

set forth in RCW 13.34.180(1)(d), because it did not offer or provide any of the services set forth in the dependency disposition order.

"Parents have a fundamental right to the care and custody of their children, and a trial court asked to interfere with that right should employ great care." *In re Welfare of M.R.H.*, 145 Wn. App. 10, 23, 188 P.3d 510 (2008) (citing *In re Welfare of H.S.*, 94 Wn. App. 511, 530, 973 P.2d 474 (1999)). However, while family reunification is the first priority under the termination statute, our legislature has also declared that where the parents' legal rights and a child's right to basic nurture, physical, and mental health conflict, the child's rights and safety should prevail. RCW 13.34.020.

Parental rights' termination is a two-step process. *In re Welfare of C.B.*, 134 Wn. App. 942, 952, 143 P.3d 846 (2006). First, the Department must show the six statutory requirements of RCW 13.34.180(1) are established by clear, cogent, and convincing evidence. RCW 13.34.190(1)(a). The Department must show that the ultimate fact in issue is "highly probable." *In re Dependency of K.R.*, 128 Wn.2d 129, 141, 904 P.2d 1132 (1995) (quoting *In re Welfare of Sego*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973)) (internal quotation marks omitted). Second, if the termination factors are established, the Department must show by a preponderance of the evidence that termination is in the best interests of the child. RCW 13.34.190(2); *C.B.*, 134 Wn. App. at 952.

Here, Ms. Hoit solely contests RCW 13.34.180(1)(d):

> That the services ordered under RCW 13.34.136 have been

> expressly and understandably offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered or provided.

The factual findings will not be overturned "if supported by substantial evidence from which a rational trier of fact could find the necessary facts by clear, cogent, and convincing evidence." *In re Dependency of K.S.C.*, 137 Wn.2d 918, 925, 976 P.2d 113 (1999). "Because only the trial court has the opportunity to hear the testimony and observe the witnesses, its decision is entitled to deference and this court will not judge the credibility of the witnesses or weigh the evidence." *M.R.H.*, 145 Wn. App. at 24 (citing *In re Dependency of A.V.D.*, 62 Wn. App. 562, 568, 815 P.2d 277 (1991)).

RCW 13.34.180(1)(d) "expressly requires both that all services *ordered* have been provided, *and* that all *necessary* services reasonably available have been provided." *In re Dependency of T.L.G.*, 126 Wn. App. 181, 200, 108 P.3d 156 (2005) (emphasis in original). With respect to services ordered, RCW 13.34.180(1)(d) refers to those ordered under RCW 13.34.136. *In re Dependency of A.A.*, 105 Wn. App. 604, 608, 20 P.3d 492 (2001). RCW 13.34.136 addresses "services the parents will be offered to enable them to resume custody." RCW 13.34.136(2)(b)(i). RCW 13.34.136 requires the Department to "provide all reasonable services that are available within the agency, or within the community, or those which the department has existing contracts to purchase." RCW 13.34.136(2)(b)(vi); *see also A.A.*, 105 Wn. App. at 608.

In addition, RCW 13.34.180(1)(d) requires the Department "to affirmatively offer

or provide necessary services." *In re Welfare of Hall*, 99 Wn.2d 842, 850, 664 P.2d 1245 (1983). At a minimum, the Department must provide the parent with a referral list of agencies or organizations that provide the services. *Id*.

Here, sufficient evidence may not support the trial court's finding, pursuant to RCW 13.34.180(1)(d), that the services ordered by the trial court under RCW 13.34.136 were expressly and understandably offered or provided. On February 15, 2007, in its dependency disposition order, the trial court ordered the Department to provide Ms. Hoit with specified services. Although Ms. Young was aware that Ms. Hoit was incarcerated in the Spokane County Jail most of the time between the entry of the dependency order and the termination hearing, she never went to the jail to talk to Ms. Hoit nor did she send her any correspondence. The Department failed to make even the minimum effort of providing Ms. Hoit with a referral list to agencies providing the ordered services. *See Hall*, 99 Wn.2d at 850.

Nonetheless, "even where the State inexcusably fails to offer a service to a willing parent, . . . termination is appropriate if the service would not have remedied the parent's deficiencies in the foreseeable future, which depends on the age of the child." *T.R.*, 108 Wn. App. at 164. This means that when the record establishes that the offer of services would have been futile, the trial court can make a finding that the Department has offered all reasonable services. *In re Welfare of Ferguson*, 32 Wn. App. 865, 869-70, 650 P.2d 1118 (1982), *rev'd on other grounds*, 98 Wn.2d 589, 656

P.2d 503 (1983).

In *T.R.*, the trial court terminated the mother's parental rights to her child. *T.R.*, 108 Wn. App. at 153. Prior to the termination order, for a period of more than six years, the mother received 11 different services. *Id*. at 162, 164. On appeal, the mother argued, in relevant part, that the Department failed to prove the statutory element set forth in RCW 13.34.180(1)(d) by clear, cogent, and convincing evidence. *Id*. at 161. Specifically, the mother argued that not all necessary services were offered, because family therapy was recommended, but not provided. *Id*. at 162. The court found "[t]he evidence does not indicate that family counseling would have improved [the mother's] ability to function as a parent." *Id*. at 163. The mother further argued she needed a longer period of services. *Id*. at 164.

The court rejected this argument, reasoning that the Department provided services for more than six years to the mother, despite her intermittent attendance and minimal progress. *Id*. Finally, the court stated, "even where the State inexcusably fails to offer a service to a willing parent, which is not the case here, termination is appropriate if the service would not have remedied the parent's deficiencies in the foreseeable future, which depends on the age of the child." *Id*. At the time of the termination trial, T.R. was six years old, and had been in foster care her entire life. *Id*. at 164-65. The court found that "[t]o wait another year, or longer, is to wait well beyond T.R.'s foreseeable future." *Id*. at 165. Accordingly, the court found that substantial

evidence supported the finding that the statutory element set forth in RCW 13.34.180(1)(d) had been met. *Id*.

Ms. Hoit argues that *T.R.* does not apply, because there, numerous services were provided, whereas here, none of the court-ordered services were provided. Nonetheless, the unchallenged findings of fact show that prior to the court ordering services, the Department offered Ms. Hoit substance abuse treatment twice and referred her for a bonding and attachment assessment, and that Ms. Hoit did not follow through. And, also prior to the court ordering services, Ms. Young twice referred Ms. Hoit for UAs, with Ms. Hoit completing just two UAs before telling Ms. Young she could not do them anymore. In addition, Ms. Hoit briefly and unsuccessfully entered drug treatment four times.

Under these facts, "the service[s] would not have remedied the parent's deficiencies in the foreseeable future." *T.R.*, 108 Wn. App. at 164. In addition, J.H. is five years old, and she has been in foster care since she was three years old. Like in *T.R.*, to wait another year or longer for Ms. Hoit to remedy her parental deficiencies is well beyond J.H.'s foreseeable future. *Id.* at 165.

Although Ms. Young testified the services ordered in the dependency disposition order were services she felt were reasonably available, and could potentially correct Ms. Hoit's parental deficiencies, she testified Ms. Hoit had not made any progress in addressing her issues, and that there was little likelihood of change in the near future.

Ms. Hemphill testified change was unlikely in the foreseeable future.

In sum, despite the challenge to the critical finding under RCW 13.34.180(1)(d), our record establishes that the trial court correctly determined that the offer of services to Ms. Hoit would have been futile. *See Ferguson*, 32 Wn. App. at 869-70. The trial court correctly observed that without taking the preliminary substance abuse treatment step, other services were futile. Accordingly, substantial evidence supports the trial court's finding that the element set forth in RCW 13.34.180(1)(d) was met, and therefore, the trial court did not err.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Brown, J.

WE CONCUR:

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Kulik, A.C.J. Korsmo, J.